

Damage awards for conspiracy to breach a freezing order and contempt of Court: new and important innovations or damp squibs?

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***JSC BTA Bank v Khrapunov
[2018] UKSC 19***

JSC BTA Bank v Khrapunov

Decision of the Supreme Court on unlawful means:

- What constituted **unlawful means** did not depend on whether the use of those means would give rise to **a different cause of action** independent of conspiracy, but whether there was a **just cause or excuse** for combining to use unlawful means
- **Breach of a court order** amounting to contempt of court would constitute unlawful means

JSC BTA Bank v Khrapunov

The decision of the Supreme Court on jurisdiction:

- Article 5(3) of the Lugano Convention applied
- The “**place where the harmful event occurred**” meant the relevant harmful event which set the tort in motion
- The relevant harmful event was the **agreement to conspire** which was concluded in England

Two Key Questions

1. Does this development enable fraud lawyers to do something they could not previously have done?
2. Can such a claim be easily and effectively prosecuted?

Conspiracy to injure by unlawful means

A claimant must prove that:

- Two or more persons (the conspirators)
- Entered into a **combination, agreement or arrangement** to use unlawful means
- With the **intention of causing damage** to the claimant
- The claimant suffered loss as a result

Knowledge in
conspiracy to
injure by
unlawful
means

*Racing Partnership Ltd v Sports Information
services Ltd [2021] FSR 2 (CA)*

*“knowledge of the unlawfulness of the means
employed is **not required** for unlawful means
conspiracy”*

Personal or Proprietary Claims

Freezing order in support of a personal claim for damages

- The purpose is to ensure that if judgment is ultimately obtained, there will still be assets against which it can be enforced
- A claim for damages in the tort of deceit

Freezing order in support of a proprietary claim

- The purpose of the order is to prevent the defendant from disposing of or concealing property that **belongs to the claimant**
- The proceeds of fraud and theft are **impressed with a trust** in favour of the victim

Dishonest assistance in a breach of trust

A claimant must prove that:

- There is a **trust**
- There is a **breach of trust** by the trustee
- The defendant to the dishonest assistance claim **assisted the trustee** in that breach of trust
- The defendant **acted dishonestly** in providing that assistance

The test of dishonesty in a dishonest assistance claim

- *Ivey v Genting Casinos (UK) Ltd [2017] UKSC 67*
- *Group Seven Limited v Notable Services LLP [2019] EWCA Civ 614*
- Test of dishonesty in a dishonest assistance claim is **objective**

Conclusions in context of a proprietary claim

- **Not a particularly important innovation**
- A dishonest assistance claim allows a claimant to hold a third party liable for assisting in a breach of a freezing order
- Dishonest assistance a **more flexible remedy**
- Unlawful means conspiracy claims and dishonest assistance claim are often brought together – *CMOC Sales and Marketing Ltd v Persons Unknown [2018] EWHC 2230*

Conclusions in context of a personal claim for damages

- The innovation **does** enable fraud lawyers to do something they could not previously do
- An unlawful means conspiracy claim is the **only way** to hold a third party liable for assisting in a breach of a freezing order
- **Important innovation**
- *JSC BTA Bank v Khrapunov* - HHJ Waksman
21st June 2018

Jurisdiction

- JSC BTA Bank v Khrapunov – Unlawful means conspiracy governed by article 5(3) of the **Lugano Convention**
- Dishonest assistance **also** governed by article 5(3) of the Lugano Convention
- UK **no longer a party** to the Lugano Convention – has applied to rejoin
- Jurisdiction will now depend on the **permission of the court** under Rule 6.36 of the CPR and paragraph 3.1(9) of Practice Direction 6B

Conclusions

- The fact that breaching a freezing order constitutes unlawful means is undoubtedly an **interesting innovation**
- In the context of a proprietary claim, it is **not particularly important** due to the availability of a dishonest assistance claim
- In the context of a personal claim for damages it is an **important innovation**, because there is no other way of imposing liability on a third party for losses caused by a **breach of a freezing order**

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